

# **Exhibit E**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JKF)  
. .  
W.R. GRACE & CO., .  
et al., . 824 North Market Street  
. Wilmington, Delaware 19801  
Debtors. .  
. January 28, 2008  
. 1:04 p.m.  
. . . . .

TRANSCRIPT OF HEARING  
BEFORE HONORABLE JUDITH K. FITZGERALD  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtors: Pachulski, Stang, Ziehl & Jones  
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For the Debtors: Kirkland & Ellis, LLP  
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BARBARA HARDING, ESQ.  
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(Telephonic Appearance by Ms. Harding,  
Ms. Ahern, Mr. Bernick)

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1 that's not what they really want to say. They really want to  
2 say that Grace acknowledged and conceded that those were  
3 appropriate criteria. Well, Mr. Hughes would say, absolutely  
4 not, we wanted to have the benefit of a full litigation record,  
5 we wanted to have the benefit of being able to litigate these  
6 cases one-by-one, and we were coerced into this settlement  
7 arrangement.

8           Now, I wonder if we're going to get access to Mr.  
9 Cooney's files or Mr. Kraus's files to find out what their own  
10 internal files said about whether Grace was over a barrel or  
11 not, that is whether Grace was happy to acknowledge its  
12 liability in those cases or not, but we're not going to get  
13 that discovery. So, it's specious. The purpose of this  
14 proffer is (a) to make these people into expert witnesses  
15 through their own anecdotal testimony about the same matters  
16 that are covered by Dr. Peterson, and (b) to do so without  
17 divulging the internal information that they have that would  
18 bear upon cross examination, and (c) for the explicit purpose  
19 of arguing that Grace acceded to all of this and thereby, well,  
20 it's hung by its own petard, these were the rules that it  
21 agreed should supplant liability. Not so. And again, we're  
22 not going to get discovery of that either.

23           All these matters can be framed, Your Honor, on  
24 paper. They don't implicate somehow, you know, the same issue  
25 that has surfaced in Pittsburgh, that well, you know, should

1 our evidence be admissible to prove our theory or is it -- it's  
2 none of that. It's all plain and simple -- whether we're  
3 getting expert testimony masked as the testimony of fact  
4 witnesses and whether we'll end up getting stymied and  
5 frustrated on the ability to get the underlying information.

6           So, all these things can be said in a brief with the  
7 benefit of a record, rather than going through the same thing.  
8 We've had the same argument about three or four times before.  
9 And we've made a very concrete proposal for how to get a good  
10 record created. If Your Honor feels that this is amenable to  
11 resolution without a deposition so that we can then get that  
12 determination before we have to proceed with any discovery,  
13 we're happy to do it that way. I made a proffer that I thought  
14 was one that the Court would find better from the point of view  
15 of helping to frame the issues. So, again, we would ask that  
16 they pick a witness in seven days. We'll serve the document  
17 request within a week after that. We'd then ask that they  
18 respond in 14 days, and then we'll take the deposition, and  
19 once the deposition is done we'll file a brief with the Court.

20           THE COURT: Well, I have some concerns about what the  
21 scope of these alleged fact witnesses' testimony is going to  
22 be. I think some of it's going to stray far afield of Rule  
23 408. Whether it's going to violate the Hearsay Rule or not,  
24 frankly, at this point I can't tell from the proffer. I just  
25 can't tell from the proffer. I do think that it's going to run

1 afoul of Rule 408 because it does seem to me that in many  
2 instances the whole and sole purpose of attempting to get into  
3 some of this information is potentially to prove that the  
4 settlement is a criteria of liability, and I don't think you're  
5 going to get that far under Rule 408. The one thing that Rule  
6 408 is not going to let you do is prove that a settlement that  
7 specifically says that no one is acknowledging liability was  
8 used for liability purposes, and when you start asking what  
9 criteria that Grace told the plaintiffs they had to meet, what  
10 evidence was supplied to meet it, I don't know about when in  
11 the discovery or trial preparation it was -- the evidence was  
12 available, what that's going to be material to in terms of a --  
13 of Grace pre-petition, I'm not sure, but -- so, I don't know  
14 about that particular factor right now. But the first two seem  
15 to be clearly intended to get to whether or not there is some  
16 criteria that looks to be a liability inducing factor. Then --

17 MR. BERNICK: Well, we can go -- if Your Honor wants,  
18 I've got a little handy-dandy thing that I had ready to go  
19 here. This is -- we can go through this if you'd like. I,  
20 again, thought that the better way to do this --

21 THE COURT: Well, I'm only trying to get to this at  
22 the moment, Mr. Bernick, to see, you know, how much of an issue  
23 this is going to be and where in the process it should come up,  
24 whether seven days in advance under the case management order  
25 is going to be enough, because if, in fact, a record such as a

1 deposition to see (a) whether a privilege assertion of some  
2 type is going to be made, because at the moment I'm not seeing  
3 what type of questions are coming up that are going to generate  
4 a privilege question. If, in fact, a document request is made  
5 to back up some of this information and there is a privilege  
6 assertion, then I agree we're going to have to take a look at  
7 whether or not the witness can testify, but, at the moment, I'm  
8 not seeing what type of question is going to be asked that  
9 generates a privilege question, but the problem I see is that  
10 the underlying evidence anyway still appears to get to the  
11 question of liability.

12 MR. BERNICK: Well, Your Honor, I think -- we  
13 actually continue on with that same thing. When in the  
14 discovery/trial preparation process this evidence was  
15 available, that is the whole question of how these law firms  
16 work to get information on exposure, and that is the area where  
17 we specifically inquired in connection with the questionnaire  
18 process to find out about the intake forms.

19 THE COURT: Well, but that's a different issue from  
20 whether or not Grace used a process of settling to admit its  
21 liability --

22 MR. BERNICK: Well --

23 THE COURT: -- which is the issue for Rule 408.

24 MR. BERNICK: Fine. There's another one that makes  
25 it -- I think that's what they're getting at with available,